Supreme Court of the United States

OCTOBER TERM, 1948

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

I.

OPINIONS BELOW.

The majority opinion of the United States Court of Appeals for the Tenth Circuit (R. 97-102) reversing the judgment of the United States District Court for the District of Kansas is reported at 169 F. 2d 973.

The dissenting opinion of the Chief Judge (R. 102-106) is reported at 169 F. 2d 976.

The opinion of the District Court ordering petitioner discharged from the custody of respondent (R. 12-26) is reported at 72 F. Supp. 755. The oral opinion of the District Court on respondent's motion for reconsideration (R. 92-95) is not reported.

The opinion of Board of Review No. 4, Branch Office of Judge Advocate General, holding the record legally insufficient to support the court-martial judgment against petitioner (R. 66-78) and the opinion of the Assistant Judge Advocate General, dissenting therefrom (R. 78-87) are not reported.

The opinions of the staff judges advocate, Fifteenth Army, recommending that the court-martial judgment be modified and approved (R. 45-66) are not reported.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, Act of June 25, 1948, Ch. 646, Public Law 773, 62 Stat. ____. The judgment of the Court of Appeals was entered September 7, 1948 (R. 107). Petition for rehearing was denied October 8, 1948 (R. 128). The mandate was stayed (R. 128). The petition for a writ of certiorari was filed November 18, 1948. This court granted the writ January 10, 1949, 69 S. Ct. 412.

III.

STATEMENT OF THE CASE.

A.

Habeas Corpus Hearing in Trial Court.

This habeas corpus proceeding was initiated by petition to the United States District Court for the District of

Kansas whereby petitioner sought discharge from the custody of respondent who held him under court-martial order, the validity of which petitioner attacked on the primary ground that he had been twice placed in jeopardy for the same offense in violation of the Fifth Amendment (R. 2-8, 8-10, 12-13, 33-39).

The proceeding came on for hearing September 28, 1946 (R. 33). At the close of the hearing, there was no controversy between the parties as to the facts. Each specifically adopted the statement of facts (R. 68-70, Par. 4) set out in the holding of Board of Review No. 4 of the Branch Office of the Judge Advocate General with the European Theater (R. 13). However, thirty-four days after judgment, respondent, by motion, prayed that the court reconsider its decision and reopen the case for the introduction of additional evidence (R. 26, 26-30). Moreover, the statement of points relied upon by respondent in his appeal to the court below (Points 1 and 2) contains the *assertion* that the tactical situation prevented the completion of petitioner's first trial (R. 1). This assertion is not supported by the statement of facts (R. 68-70, Par. 4) set out in the holding of the Board of Review (R. 66-78). It is not supported by the evidence before the 76th Division Court-martial which first tried petitioner (R. 69). It is not supported by the evidence before the Fifteenth Army court-martial which overruled the plea of former jeopardy and convicted petitioner (R. 68-69, 119-127). It is not supported by the record before the Branch Office of the Judge Advocate General with the European Theater which reviewed the conviction (R. 66-87). It is not supported by the record made at the hearing on the habeas corpus petition (R. 2-96).

The record made at the habeas corpus hearing on September 28, 1946, disclosed that the following proceedings

had occurred resulting in the court-martial order assailed as void.

Proceedings Before the Fifteenth Army General Court-Martial.

Petitioner, a combat member of the 385th Infantry, 76th Division, U. S. Army, was brought to trial before a Fifteenth Army general court-martial at Bad Neuenahr, Germany, on June 30, 1945, on a charge of raping a German woman (R. 66-67). He pleaded former jeopardy and introduced an authenticated record of trial for the same offense before a 76th Division general court-martial (R. 68). This record established that petitioner had been tried at Pfalzfeld, Germany, on March 27, 1945, that the prosecution introduced evidence and rested, that petitioner introduced evidence (the testimony of seven members of the 385th Infantry, 76th Division[1]), and rested, that the court stated it did not desire any witnesses called or recalled, that the case was submitted, that after deliberations, the court announced it desired to hear certain named German witnesses (residents of Krov, Germany), and continued the case until a date to be fixed by the Trial Judge Advocate (R. 68-69).

The prosecution opposed the plea of former jeopardy on the sole ground that the prior trial before the 76th Division court-martial did not constitute a trial causing jeopardy to attach,[2] and introduced a letter of withdrawal as prosecution Exhibit A (R. 68-69, 119-127). This letter did

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[1]Respondent's Exhibit B, lodged with this court, contains the testimony of the seven members of the 385th Infantry, 76th Division at pages 229-226.

[2]The Trial Judge Advocate's written brief, filed with the court-martial, misstating the law of double jeopardy, appears at page 51 of respondent's Exhibit B, lodged with this court.

not contain any reason for the withdrawal of the case and reads as follows:

PROSECUTION EXHIBIT A.[1]

Headquarters 76th Infantry Division
APO 76, U. S. Army

3 April, 1945

201 — Wade Frederick W. (Enl)

Subject — withdrawal of charges

To — 1st Lt. John R. Sennott, Jr. Hq. 76th Inf. Div., T J A of G. C. M. Aptd, by Par. 2 SO 59, Hq. 76th Inf. Div. 23 Mar. '45

1. The charges in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf. are hereby withdrawn from the general court-martial appointed by Par. 2, SO 59, this Hq. 23 March, 1945, and no further proceedings will be taken by said court in connection therewith.

2. The charges and allied papers will be returned to this Hq.

By command of Major General Schmidt.

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

As thus submitted to it on the record of former trial, the letter of withdrawal and arguments and brief of coun-

[1]This exhibit is not set out in full in the record. It appears at page 200 of respondent's Exhibit B, lodged with this Court. Its content and the fact it was the only evidence offered by the prosecution in opposition to the plea of former jeopardy is disclosed in the Board of Review opinion (R. 68-69).

3. The trial judge advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

The Board of Review found that the reason assigned in this indorsement for the withdrawal of the case and its transfer to the Third Army for trial did not establish existence of an emergent situation justifying the termination of the first trial under the doctrine of imperious necessity, since it determined that the adjournment of the first trial, the letter of withdrawal and the 4th indorsement meant no more than that the first trial was terminated by reason of the absence of witnesses (R. 72-76).

The Assistant Judge Advocate General dissented, holding, in effect, that the 4th indorsement established that the charges against petitioner were withdrawn by reason of imperious necessity and that, therefore, petitioner did not have the right to plead former jeopardy at the second trial (R. 79-86). His contention was that while the termination of a criminal trial in a civil court by reason of absence of witnesses cannot justify a second trial, the termination of a court-martial trial by reason of the absence of witnesses does justify a second trial on the ground of imperious necessity (R. 79-86).

Thereupon, the Commanding General U. S. Forces, European theater, issued general court-martial order No. 2 confirming petitioner's sentence (R. 8-10).

The trial court had before it the complete court-martial records[1] made before the 76th Division Court-martial, before the Fifteenth Army Court-martial, and on review of the Fifteenth Army Court-martial judgment, the pertinent parts of which have been stated above. It also heard the testimony of petitioner that he was without knowledge that his case was being or had been withdrawn from the 76th Division court-martial until he was charged before the Fifteenth Army court-martial (R. 43). It had before it the statement of facts (R. 68-70, Par. 4) set out in the holding of the Board of Review (R. 66-78), specifically adopted by the parties (R. 13).

B:

Findings and Judgment of the Trial Court on Habeas Corpus.

The trial court found in substance the following facts on the issue of imperious necessity:

1. The absence of witnesses, rather than an emergency due to the tactical situation, was the reason for the withdrawal of the case from the 76th Division court (R. 25).

2. The Commanding General 76th Division did not find that a military situation existed requiring discontinuance of the trial before the 76th Division court (R. 24).

3. The Commanding General, 76th Division, did not find that a military situation existed requiring him to transfer the cause to a jurisdiction where military conditions permitted the production of witnesses whom the court-martial requested the Trial Judge Advocate to procure (R. 24).

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[1]Respondent's Exhibit B, lodged with this court.

4. The tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25).

The trial court specifically found the facts to be as shown in the holding of Board of Review No. 4, and the statement of facts set out in this holding was specifically adopted by the parties (R. 13). On May 9, 1947, the trial court entered judgment discharging petitioner on bond (R. 26).

C.

Motion for Reconsideration in Trial Court.

On June 12, 1947, respondent filed a motion for reconsideration, praying that the court reconsider its decision and fix a time and place whereat respondent might submit additional evidence in proof of the facts alleged in the motion (R. 26-30). On July 10, 1947, the court denied this motion for want of jurisdiction (R. 31).

D.

Proceedings in Court Below.

Respondent appealed from the judgment of the trial court, relying upon three points: the first, that petitioner was not placed in double jeopardy in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat situation of the United States in a state of war prevented its completion; second, that the court-martial, by which petitioner was convicted, did not lack jurisdiction though the identical charge and specification had been previously submitted to another court-martial for trial and had been partially tried, but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United

On September 27, 1948, petitioner filed his petition for rehearing in the court below (R. 109-127). On October 8, 1948, the court below denied the petition for rehearing, Honorable Orie L. Phillips, Chief Judge, dissenting (R. 128).

E.

Statement of Lack of Evidence.

There is a total absence of proof of any character that the tactical situation or combat conditions prevented the completion of the trial before the 76th Division court-martial (R. 1-128). There are statements in the record asserting such a contention. They were made by the Assistant Judge Advocate General on review (R. 85-86); and by counsel for petitioner (1) at the habeas corpus hearing in the trial court (R. 39-40); (2) in the motion for reconsideration filed in the trial court (R. 26-30), and (3) in the statement of points relied upon by appellant (R. 1). But the record is barren of any evidence to sustain such statements.

The 76th Division court-martial did not terminate the trial of petitioner's case. The case was withdrawn without any action being taken by that court (R. 68-69).

The Fifteenth Army court-martial did not deny petitioner's plea of former jeopardy on the ground of imperious necessity. No issue was raised, no proof was introduced on that ground in that court (R. 68-69).

IV.

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED.

A.

The court below erroneously applied the doctrine of imperious necessity to a situation in which witnesses be-

come unavailable so as to violate petitioner's constitutional right not to be twice put in jeopardy for the same offense.

B.

The court below erred in holding that the Commanding General who appointed the 76th Division court-martial had the power independent of the court, and without the knowledge or consent of petitioner, to determine that imperious necessity existed for the withdrawal of petitioner's case from the court-martial so as to preclude the defense of former jeopardy at a subsequent trial.

C.

The court below erred in holding that the action of the Commanding General in withdrawing petitioner's case from the 76th Division court-martial after jeopardy had attached was based on grounds of imperious necessity, was in the exercise of a sound discretion, and avoided the protection against double jeopardy afforded petitioner by the Fifth Amendment.

D.

The court below erred in setting aside the findings of fact made by the trial court and making new findings of fact for the following reasons:

1. The trial court's findings are supported by the facts adopted by the parties;

2. The trial court's findings are based upon substantial evidence, are not erroneous, and certainly are not clearly erroneous;

3. The findings of the court below are in conflict with the facts adopted by the parties and are in conflict with the facts found by the trial court;

4. The findings of the court below are not supported by any evidence and are contrary to the evidence.

E.

The judgment of the court below denies to petitioner due process of law in that it determines the validity of his conviction by court-martial upon the issue of imperious necessity not considered or determined by the court-martial and it determines the validity of the judgment of the trial court upon new issues of imperious necessity not considered or determined by the trial court and not raised on appeal; thereby denying to petitioner the fundamental right to know in advance what he is called upon to defend against so that he can produce evidence and be heard upon the issues to be decided.

F.

The court below erred in taking judicial notice that the armed forces of the United States engaged in the prosecution of the war in the European Theater were moving rapidly and that conditions in the field were more or less fluid; in deducing therefrom that it may have been that it was wholly infeasible, if not impossible, to produce the witnesses desired by the court-martial before the court at its location at the time of withdrawal of the charges, and in drawing from these assumptions the further assumption that the Commanding General determined that the tactical situation made it necessary or advisable to withdraw the case.

V.

SUMMARY OF THE ARGUMENT.

Because of the prohibition of the Fifth Amendment, the Fifteenth Army Court-Martial was without jurisdiction

to try petitioner and convict him for the identical offense for which he had been in jeopardy before the 76th Division Court-Martial from which the charges were withdrawn without petitioner's knowledge or consent; hence the sentence of the Fifteenth Army Court-Martial is void, and habeas corpus is available to petitioner to obtain his release from the custody of respondent who held him by reason of that void sentence. *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118; *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461.

Three judges advocate who were members of a statutory Army Board of Review (pursuant to Article of War 50½, 10 U. S. C. A., Sec. 1522) held that petitioner had twice been put in jeopardy in violation of the Fifth Amendment of the Constitution (R. 66-78). The trial court so held and ordered his release on habeas corpus (R. 12-26, *Wade* v. *Hunter*, 72 F. Supp. 755). The Chief Judge of the court below so held, in his dissenting opinion (R. 102-106, *Hunter* v. *Wade*, 169 F. 2d 973, 976).

The majority opinion of the court below recognizes that the constitutional guaranty of the Fifth Amendment protects an accused against a second trial, that violation of this guaranty deprives the court of jurisdiction to try the accused, and that a federal court has jurisdiction in habeas corpus to determine whether the sentence of the court-martial was void for the reason that petitioner was twice placed in jeopardy for a single offense, and if so to order his discharge (R. 99-100), *Hunter* v. *Wade*, 169 F. 2d 973, 975.

The sole ultimate question in this case, as raised by respondent in his appeal (R. 1) and by the majority opinion of the court below is whether the withdrawal of the case from the 76th Division Court-Martial can be justified under the doctrine of "imperious" necessity, and thus preclude a

plea of former jeopardy and consequent lack of jurisdiction of the second court-martial.

Petitioner presents his argument upon this question under four points, here summarized.

A.

Assuming the withdrawal of the charges from the first court-martial to have been based upon the infeasibility or impossibility of producing absent witnesses before the 76th Division Court-Martial growing out of the tactical situation intervening and developing after the court reopened and continued the case for the purpose of securing the attendance of additional witnesses—as found by the Court of Appeals—such a situation did not justify the withdrawal upon the ground of imperious necessity. Fifth Amendment to Constitution; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165; *Cornero* v. *U. S.*, (Ninth Circuit) 48 F. 2d 69; and other cases cited under this point.

B.

The Commanding General was without the power or discretion, independent of the court and without the knowledge or consent of petitioner, to determine the existence of imperious necessity for the withdrawal of petitioner's case from the 76th Division Court-Martial.

A trial court-martial has the power, in the proper exercise of its sound judicial discretion, to terminate a trial upon grounds of imperious necessity. But the Commanding General cannot preempt this power, since he is not a part of the court-martial and cannot usurp its judicial functions. He may withdraw charges but after jeopardy has attached, he cannot by the use of this administrative prerogative place an accused in jeopardy a second time for the same offense. Not even a trial court has the right

to terminate a trial on the ground of imperious necessity in *ex parte* proceedings.

C.

Assuming but not conceding the power of the Court of Appeals to make new findings of fact upon the record presented to it, the findings it did make as to the cause of the withdrawal of the case are clearly erroneous. They purport to be based on a communication, the 4th indorsement (whereby the charges and allied papers in petitioner's case were transmitted to the Commanding General, Third Army), which communication is an unsworn, *ex parte*, hearsay document, not introduced into evidence in the trial before the Fifteenth Army Court-Martial; and on judicial notice. The statements in the communication and the matters of history of which the Court of Appeals took judicial notice do not support the conclusion drawn therefrom that the Commanding General determined it was necessary or advisable for him to withdraw the case because of a tactical situation which intervened to make infeasible or impossible the production of certain witnesses before the court-martial. The record is barren of any evidence that it was either necessary or advisable to withdraw the case or that the Commanding General so determined. The contrary clearly appears from the record. The court below acknowledges that its findings as to the cause for the withdrawal of the case (which it somehow concludes were also made by the Commanding General) may be wrong, as indicated by the statement in the majority opinion:

> "It may be that the case should have remained with the Court instead of being withdrawn" (R. 101, 169 F. 2d 973-976).

The findings of the trial court on the other hand are based upon substantial evidence and are clearly correct.

They are based upon the facts stipulated by the parties (R. 13). Unless these findings are clearly erroneous they cannot be set aside (Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A., foll. 723(c)).

D.

The validity of the court-martial sentence must be appraised upon the issues considered and determined by the Fifteenth Army Court-Martial. The issue of imperious necessity was not considered or determined by that court. The holding of the Court of Appeals that the issue of imperious necessity was determined by the Commanding General denies to petitioner due process of law since he had no notice or opportunity to contest this issue.

The validity of the judgment of the trial court on habeas corpus must be appraised upon the issues considered and determined by that court. The Court of Appeals originally raised and decided the issue that the Commanding General determined in the exercise of a sound discretion that it was necessary or advisable to withdraw the case from the 76th Division Court-Martial, it was not considered or determined by that court. It was not raised by respondent on appeal. Thus, the holding of the Court of Appeals on this issue denies to petitioner due process of law since he had no notice or opportunity to contest this issue. *Cole v. Arkansas*, 332 U. S. 834, 92 L. Ed. 429.

VI.

ARGUMENT.

A.

Infeasibility or impossibility of producing absent witnesses before the court arising after jeopardy attached would not justify the withdrawal of charges against peti-

tioner so as to preclude the defense of former jeopardy guaranteed by the Fifth Amendment. Whatever the underlying cause, the absence of witnesses is not ground for the termination of a trial so as to sanction a second prosecution for the same offense. It is not a sudden, uncontrollable or unforeseeable emergency requiring termination of the trial, and a second trial in the interest of public justice.

For the purpose of this argument we assume the propriety of the factual determinations of the court below and assume that the withdrawal of the case from the court-martial is analogous to action of a presiding judge in the presence of the accused of declaring a mistrial in a criminal case in a civil court.

The double jeopardy clause of the Fifth Amendment reads:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

This constitutional provision is one of many contained in the Bill of Rights, designed to protect persons accused of crime against the dreadful circumstance of being convicted of crimes which they did not commit. It is a safeguard against conviction and punishment of innocent persons. It is abhorrent to the sense of American justice to permit successive prosecutions until a conviction is obtained.

It is especially vital to recognize this safeguard in trials by court-martial since soldiers are not accorded the right of trial by jury, bail, appeal and other safeguards granted civilians to insure against miscarriages of justice. Soldiers are tried according to the Articles of War (10 U. S. C. A., Secs. 1471 *et seq.*) and the Manual for Courts-Martial U. S. Army. In criminal cases in civil courts the

trial is presided over by a judge learned in the law, and conviction or acquittal requires unanimity of a twelve-man jury selected from the community. In general courts-martial cases the Commanding Officer directs that certain cases be tried before a general court-martial appointed by him, composed of officers selected by him, and the members of the court-martial are both judge and jury (10 U. S. C. A., Secs. 1475, 1479, 1502, 1542). Conviction requires concurrence of three-fourths or two-thirds of the members present, depending on the offense charged (10 U. S. C. A., Sec. 1514). Failure to obtain this required concurrence results in acquittal (Manual for Courts-martial, Sec. 78d). The judgment of conviction of petitioner, assailed as void in this proceeding, was entered by a divided court (R. 67) composed of officers no one of which was a lawyer (R. 46).

The power of the court to terminate a trial because of imperious necessity, without affording the accused the right to plead former jeopardy in a subsequent prosecution for the same offense, has been recognized.

What is the extent of this power? In *U. S.* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (a case involving the discharge of a jury which was unable to agree) the court said:

> "To be sure, the power ought to be used with the greatest caution, under urgent circumstances; and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

In *Cornero* v. *U. S.*, (C. C. A. 9) 48 F. 2d 69, the facts were these: Cornero and others were charged with conspiracy to violate the National Prohibition Act. On May 3, 1928, when the case was called for trial, the Dis-

trict Attorney proceeded to impanel the jury without having ascertained whether or not his witnesses were present. He was relying on the testimony of two of the co-defendants who had previously plead guilty and who were released under bond to appear for sentence on the day of the trial. The court continued the case from time to time to May 8th, at which time the District Attorney moved for a further continuance, stating the matter involved intimidation of witnesses. The defendants opposed the continuance and moved for an instructed verdict of not guilty. The court discharged the jury over defendants' objection and exception. On May 6, 1930, Cornero was again brought to trial. He interposed a plea of former jeopardy which was overruled. He was convicted and appealed. The court reversed the judgment with instructions to dismiss the case and discharge defendant. The court said, l. c. 71, 73:

> "We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. * * * mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of his right to claim former jeopardy upon a subsequent trial where the jury is discharged without his consent and notwithstanding his objection."

In this case, to paraphrase the language of the majority opinion (R. 101) it was wholly infeasible, if not impossible, to produce the absent witnesses before the court at its location at the time the court discharged the jury. The court discharged the jury not because the witnesses were absent, but because they could not be produced by the prosecution. Although the court below cites this case with approval (R. 100), it has decided petitioner's case in

disregard of the law announced in it. The judgment of the court below is also in conflict with *U. S.* v. *Shoemaker*, 27 Fed. Cas. (No. 16279), 1067; *State* v. *Richardson*, 47 S. Car. 166, 25 S. E. 220; *Allen* v. *State*, 52 Fla. 1, 41 So. 593, and *Pizano* v. *State*, 20 Tex. App. 139, 54 Am. Rep. 511, which it nevertheless cites with approval (R. 100). It is also in conflict with *U. S.* v. *Watson*, 28 Fed. Cas. (No. 16651) 449. See also *State* v. *Grayson*, 156 Fla. 435, 23 So. 2d 484; *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606; *U. S.* v. *Kraut*, 2 F. Supp. 16.

The absence of witnesses from a trial is a common thing. The causes for the absence of the witnesses may arise before or during trial. These causes are frequently unknown to the court and counsel. The feasibility or possibility of producing absent witnesses may depend on various factors, such as the reach of the court's process, the availability of funds to locate and transport them, their willingness or ability to attend the trial, the ability to locate them, the time and space involved.

The holding of the court below that absence of witnesses justified the withdrawal of this case from the 76th Division court-martial on the determination that it may have been infeasible or impossible to produce them, and that this situation arose subsequent to the continuance of the trial for the purpose of obtaining their attendance (even if that determination were correct) is unsupported by reason or authority and violates the fundamental constitutional right of petitioner not to be twice put in jeopardy for the same offense. This holding is susceptible of great abuse and this case is a terrifying example of such abuse. Petitioner is entitled to the presumption that the 76th Division court-martial would have acquitted him just as the Fifteenth Army court-martial acquitted Cooper in his first trial (R. 45).

B.

The Commanding General not being a part of the 76th Division court-martial was without power or discretion independent of the court and without the knowledge of petitioner to determine that the case should be withdrawn for reasons of imperious necessity.

Here again for the purposes of this argument we assume that the Commanding General determined that it was necessary or advisable to withdraw petitioner's case and refer it to the Commanding General Third Army for trial before another court-martial. The Commanding General is as much a part of the prosecution as a grand jury which indicts, or the attorney general or other chief law enforcement officer instituting criminal prosecutions in civil courts. He is not in the position of a presiding judge. He does not preside. He is not a judge. He does determine what cases to refer to a general court-martial for trial (10 U. S. C. A., Sec. 1542) and does have power to approve or disapprove a court-martial finding and sentence (10 U. S. C. A., Secs. 1517, 1518). These are *ex parte* proceedings. He cannot usurp the function of the trial court-martial to determine matters arising in the trial. The Commanding Officer in withdrawing a case from a court-martial is acting in an administrative and not a judicial capacity. He is acting in the role of a prosecutor who decides that the case should not be prosecuted. A presiding judge on the other hand, acts in a judicial capacity.

In this case the 76th Division court-martial did not declare a mistrial. In a letter to the Trial Judge Advocate of that court the Commanding General directed that no further proceedings be taken by the court in connection with the case (R. 69, 68). Petitioner had no knowledge that the Commanding General was going to withdraw or

had withdrawn his case from the 76th Division court until he was charged before the Fifteenth Army court (R. 43).

In *Baker* v. *Commonwealth*, 280 Ky. 165, 132 S. W. 2d 766, the court said:

> "It is generally held also that the incapacity of a juror from further service and the necessity for discharge are matters requiring a judicial finding, to be heard and determined by judicial methods, and it is prejudicial error for the court on its own motion or on mere reports and in the absence of the accused, to determine that a necessity exists requiring the discharge of a jury." See also *U. S.* v. *Shoemaker*, *supra*; *State* v. *Richardson*, *supra*.

Even if we assume a judicial power in the Commanding General to withdraw cases from a court-martial appointed by him for the purpose of a second trial its exercise under the circumstances of this case would have constituted an unconstitutional abuse of power. See *Cornero* v. *U. S.*, *supra*; *Pizano* v. *State*, *supra*.

C.

The findings of fact of the trial court were right. The findings of the court below, inconsistent therewith, are not supported by any evidence and are contrary to the evidence.

The inconsistency between the findings of the trial court and the court below arises from the effect given to the tactical situation. The trial court found that the tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25). The court below found that "it is fairly clear" that the withdrawal was based upon the tactical situation intervening and developing after the

trial, which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

At the outset it should be noted that the parties adopted the statement of facts contained in the holding of the Board of Review (R. 13). Furthermore the trial court had before it the complete court-martial records whereas the court below apparently examined only the transcript of the record settled by the parties upon the basis of the statement of the points relied upon by respondent. The court below bottomed its findings upon the 4th indorsement to the charge sheet (R. 100-101) and judicial notice (R. 101). The communication known as the 4th indorsement transferred the case to the Third Army (R. 69, R. 16, footnote). It should be examined in conjunction with the letter of withdrawal (R. 68-69) which was introduced in evidence before the Fifteenth Army court-martial (R. 68-69, 122) and the proceedings before the 76th Division court-martial in connection with the closing and reopening of the case (R. 69, 15-16). It should be examined in the light of the fact that the Commanding General (or whoever wrote the indorsement for him) must have known that a new trial would involve the attendance not only of the German witnesses, residents of Krov, but also the American witnesses, members of the 76th Division, who would have to travel from the point where their organization was located at the time of the new trial to the place where the new trial was conducted (unless the new court-martial came to them). It should be examined in the light of the fact that it was not introduced in evidence before the Fifteenth Army court-martial (R. 68-69, 119-127) and was an unsworn, hearsay, *ex parte* document. Paragraph one of the communication states that two witnesses were unable to be present due to sickness, and the court continued the case so that their testimony could be obtained. The time of the discovery of this "sickness"

or the duration thereof is not indicated. It is known that the trial was commenced and concluded without them (R. 69) and later reopened to obtain their testimony. It is known that one of the witnesses (the mother of the alleged victim) did not testify in the second trial (R. 45-65). The paragraph continues "due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time." The distance is not stated. What is meant by "a reasonable time" is not stated. It is clear, however, that only sickness and distance are interposed as reasons for the absence of these witnesses. These are not unusual reasons for the absence of witnesses. The tactical situation, according to the communication, affecting only the distance to the residence of the witnesses, it did not affect the ability of the court to hear testimony from witnesses brought before it. There is no indication that it was infeasible to produce the witnesses except the inference that they were sick or physically unable to travel, a situation, which, according to the communication, existed at the time of the commencement of the trial. The court below concedes "it may be that distance or emergency growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony" (R. 101). There is not the slightest proof of any character as to the nature of the tactical situation. There is no proof that the witnesses could not have been produced before the court in a matter of hours, at any point in American occupied Germany unless they were too ill to ride in any type of army transportation, ambulance, truck, limousine or airplane. There is no proof that the court could not have gone to Krov, Germany, to hear the testimony of these witnesses if they were physically incapable of travel-

ing. Courts-martial, unlike civil courts, can meet anywhere, any time.

The court below has construed this communication contrary to its terms, giving to it a broader meaning than the unambiguous expressions contained in it apparently because of what it calls "matters of history of which judicial notice may be taken" (R. 101). The court below characterizes the movement of American forces in the European Theater as rapid (indicating absence of resistance) and conditions in the field as more or less fluid (indicating a co-mingling of American and German troops). Petitioner does not recognize this tactical situation. Petitioner does not understand how this picture affects this case.

. . . It seems evident that had it been possible for the prosecutor to establish that petitioner's case was withdrawn from the 76th Division court-martial for reasons of necessity growing out of a tactical situation he would have produced evidence before the Fifteenth Army court-martial at the time petitioner presented his plea of former jeopardy. It seems evident that if respondent had been able to establish such facts he would have produced evidence at the hearing on petitioner's habeas corpus petition.

The simple fact, plainly disclosed by the record, is that there was no necessity, justification, or excuse for the withdrawal of petitioner's case from the 76th Division court-martial for the purpose of trying him anew.

In finding otherwise, the court below disregarded the facts stipulated by the parties (R. 13), disregarded the findings of the trial court in violation of Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A., foll. Sec. 723c, and surmised a factual situation which did not exist.

D.

The judgment of the court below denies to petitioner due process of law. The validity of the court-martial judgment and order, assailed in this habeas corpus proceeding, should have been appraised on consideration of the case as it was tried and as the issue of former jeopardy was determined by the Fifteenth Army court-martial. No issue of imperious necessity was there raised or determined (R. 68-69, 119-127). The validity of the judgment of the trial court on habeas corpus should have been appraised on consideration of the case as it was tried and as the issue of former jeopardy was determined by the trial court. No issue of the infeasibility or impossibility of producing absent witnesses, due to the tactical situation, or of such a determination by the Commanding General in the exercise of a sound discretion was there made or determined.

On June 30, 1945, when petitioner pleaded and proved former jeopardy before the Fifteenth Army court-martial at Bad Neuenahr, Germany (R. 66, 68-69), or on September 28, 1946, when petitioner presented his petition for a writ of habeas corpus at Kansas City, Kansas (R. 33), had he known the basis upon which the court below was thereafter to decide his case, he would have had an opportunity to be heard and to produce evidence in opposition thereto. He had no way of anticipating these new matters.

In *Cole* v. *Arkansas*, 332 U. S. 834, 92 L. Ed. 429, 432, the court said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

This principle applies with equal force to issues raised on petitioner's plea of former jeopardy and his habeas corpus petition.

Only by a genuine trial of known issues in adversary proceedings, can the true facts be established and just judgments rendered.

CONCLUSION.

For the errors assigned, the judgment of the court below should be reversed and the judgment of the District Court affirmed. The opinion of the Chief Judge of the court below should become the law of the case.

Respectfully submitted,

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